IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1873

ERNEST GABAUER, *et al.*,
Petitioners,

v.

LEONARD WOODCOCK, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF IN OPPOSITION FOR RESPONDENTS

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Respondents Woodcock, Mazey, Worley, Mattix, Lavin, Webster, Hartzell and Young, by counsel, respectfully pray that the Court *deny* the Petition for Writ of Certiorari.

OPINION BELOW

The opinion below is reported at: *Gabauer et al.* v. *Woodcock et al.*, 594 F.2d 662 (8th Cir. 1979) (*en banc*),[1] *affirming in part and reversing in part*, 425 F. Supp. 1 (E.D. Mo. 1976).

[1] The unpublished panel opinion was withdrawn. 594 F.2d 662, 664 n.1. (Pet. App. at 30) The Appendices to the Petition will be cited in the form "Pet. App. at ——."

COUNTERSTATEMENT OF QUESTIONS PRESENTED

I

Petitioners urge the expansion of federal jurisdiction by transmuting § 501(a) & (b) of the LMRDA [2] into a vehicle by which an individual union member can impose derivative damages on, and secure injunctive relief against officers for certain expenditures, even though those expenditures were authorized by the governing bodies of the organization.

Did the Eighth Circuit, *en banc*, following the Seventh Circuit's *McNamara* v. *Johnston*, 522 F. 2d 1157 (7th Cir. 1975) *cert. den.* 425 U.S. 911 (1976), correctly *refuse* such an expansion of federal jurisdiction?

II

International Union officials are sued, under § 201(c) of the LMRDA,[3] in St. Louis, far from Detroit, where the International Union "maintains its principal office." Various officials of St. Louis Local Unions are also sued. All object to venue. Did the Court below properly remand as to records in the control of the St. Louis officials, while affirming dismissal as to those in the control of the Detroit officials?

COUNTERSTATEMENT OF THE CASE

This is the last of two companion cases, sponsored by the same group,[4] premised on the same theory, and directed at the same end. The theory is that federal jurisdiction should be expanded by transmuting § 501(a) & (b) of the LMRDA into a vehicle by which an individual union member can impose derivative damages on, and secure injunctive relief against officers for certain expenditures, even though those expenditures were authorized by the governing bodies of the organization. The target of this effort is the UAW's Community Action Program (CAP). *McNamara* v. *Johnston*, 522 F.2d 1157, 1163 (7th Cir. 1975), *cert. den.* 425 U.S. 911 (1976), was directed against the Illinois CAP. The instant case is directed against Missouri CAP. The Seventh and Eighth Circuits reached the same conclusion.

[2] Labor-Management Reporting and Disclosure Act of 1959 (LMRDA), 29 U.S.C. §§ 401-531, § 501(a) & (b), commonly known as "Landrum-Griffin." (Pet. App. at 77-8).

[3] 29 U.S.C. § 431(c) (1975). (Pet. App. at 72).

[4] *See: UAW* v. *Nat. Right to Work Legal Defense & Ed. Foundation*,—F. Supp—(D.D.C. 1978), 95 L.R.R.M. 2584, 2586-7, *aff'd in part, vacated in part & remanded*, 590 F.2d 1139 (D.C. Cir. 1978).

Facts

The 1968 UAW Convention gave the International Executive Board (IEB) authority to establish a national, state and local CAP structure to replace the soon-to-be-terminated relationship with the AFL-CIO's COPE program. The IEB thereafter established a CAP structure, which has since been ratified by the UAW Convention. 594 F.2d at 668-9 (Pet. App. 42) *See*: UAW Constitution (1977), Art. 23. Under this structure, state and local CAP Councils were established in, among other places, Illinois and Missouri. The defendants-respondents here are the various elected officials of the St. Louis and Missouri CAP Councils, as well as of the International Union. (Pet. at 4 n.3). In *McNamara*, the defendants held analogous positions. 522 F.2d at 1158-9.

The regular UAW CAP structure is financed by 3% of monthly dues. Expenditures are made by vote of elected delegates to each CAP Council, or, between meetings, by the elected executive bodies of the Council. Any UAW member who dissents from this use of his dues has a right under Article 16 § 7 of the UAW Constitution to obtain a pro-rata rebate which includes the 3%

of dues alloted to CAP, as well as other expenditures for political or ideological purposes. 594 F.2d at 668-669, *incl.* n.4 (Pet. App. at 42), *compare McNamara*, 522 F.2d at 1164, 1166 n.11.

The regular CAP structure deals with community service, as well as state and local political issues. A separate, segregated fund—UAW Voluntary CAP—handles federal elections. 594 F.2d at 673-4 (Pet. App. at 52-4).[5]

Proceedings Below

Disagreeing with the UAW Constitution and Convention, the petitioners filed suit under § 501(a) & (b) of the LMRDA, 29 U.S.C. § 501(a) & (b), seeking injunctive relief forbidding the organization's officers from spending funds for "partisan political activities or . . . ideological causes" with which these particular plaintiffs disagree, and derivative damages from these officials for expenditures of this sort. 594 F.2d at 667-8 (Pet. App. at 39-40). *Compare*: *McNamara*, 522 F.2d at 1162. This is Count II of the Complaint. Count I prays for the inspection of certain records, some in Detroit and some in St. Louis. Count I is premised on § 201(c) of the LMRDA, 29 U.S.C. § 461(c) (1975).[6]

[5] This is to comply with the Federal Election Campaign Act, as amended, 2 U.S.C. §§ 431-455 (1976), *esp.*, § 441b. While this case has been in litigation, Congress also passed 26 U.S.C. § 527 (1975), adjusting the taxability of entities like CAP, even where their activities are exclusively non-federal. In response, the UAW, like many organizations, has further segregated community service expenditures from state/local "exempt function" (*i.e.*, political) expenditures. The former continue to be handled by CAP. For the latter, a similar, but segregated "PAC" structure has been established. During the time in question in this case, however, CAP handled both community service and state/local political expenditures.

[6] We need not discuss the welter of collateral claims mentioned in the Petition, as none are of significance or relevance. The short answer is in the Eighth Circuit's own recitation, 594 F.2d at 664-6 (Pet. App. 30-35). Many of these red herrings are rooted in Gabauer's and Huskey's removal from office for gerry-mandering and misappropriation of union funds. They lost these issues in earlier litigation. *See: Gabauer* v. *Woodcock*, 520 F.2d 1084 (8th Cir. 1975), *cert. den.* 423 U.S. 1061 (1976); and *Huskey* v. *Woodcock*, 520 F.2d 1096 (8th Cir. 1975), *cert. den.*, 423 U.S. 1061 (1976). A review of these decisions is, perhaps, useful as background.

The District Court dismissed the § 501 claim (Count II) for failure to state a claim, following *McNamara* v. *Johnston*, 522 F.2d 1157 (7th Cir. 1975), *cert. den.* 425 U.S. 911 (1976). Recognizing the venue problem as to Detroit records, the District Court dismissed Count I with leave to refile as to the St. Louis records. 425 F. Supp. 1, 5 (E.D. Mo. 1976). (Pet. App. at 64-6). Petitioners refused to refile the § 201(c) claim (Count I).

On appeal, the panel affirmed as to the § 501 claim, agreeing that *McNamara* should be followed.

As to the § 201(c) claim, it affirmed as to the Detroit records, since the International Union's "principal office" was there. However, it reversed as to the St. Louis records, holding that the District Court should not have dismissed.

The Eighth Circuit reheard the § 501 claim (Count II) *en banc*. The § 201(c) claim (Count I) was not reheard, and the full Court followed the panel decision—affirming the dismissal of the International Union's Detroit officials for improper venue, since its "principal office" was not in St. Louis; reversing and remanding as to St. Louis records, since Local 25's "principal office" was in the Eastern District of Missouri.

On the § 501 issue (Count II) the full Court affirmed dismissal, as had the panel, following the Seventh Circuit's *McNamara* decision. 594 F.2d at 668-674 (Pet. App. at 41-54). The dissent, authored by Judge Ross, argued that dismissal was not appropriate, and a remand should be had to inquire into whether the expenditures

in question were "antithetical" to the interests of the membership. 594 F.2d at 674-6 (Pet. App. 54-8). The majority of the Eighth Circuit, agreeing with the Seventh, held that Congress did not intend § 501 as a vehicle for that sort of inquiry, at least in the circumstances of this case.

ARGUMENT

As to the § 501 claim, the Eighth Circuit rejected petitioners' arguments, expressly agreeing with the Seventh Circuit[7] using the following straight-forward, restrained analysis:

> Congress, as evinced by both the language of § 501 and its legislative history, intended that section to incorporate the common law approach to fiduciary responsibility. The Complaint is devoid of allegations of adverse dealing, personal gain, disobedience of the principal and other such conduct. In the UAW's case, there is specific authorization from the principal for the conduct of which petitioners complain. So, under the established rules of agency, the agent officers cannot be held derivatively liable for the use of the organization's property, even in an unlawful manner, since the principal authorized the agent's conduct.[8] Petitioners' contention that the UAW Constitution and Resolutions are "exculpatory," is rejected by a quotation of *McNamara*:

[7] "We believe that the trial court properly followed *McNamara* v. *Johnston*, 522 F.2d 1157 (7th Cir. 1975), cert. den. 425 U.S. 911 . . . (1976), and correctly held that the appellees did not breach their fiduciary duty by making the questioned expenditures." 594 F.2d at 668 (Pet. App. at 41).

[8] This is consistent with the Eighth Circuit's own holdings that, if the officials had refused to make authorized expenditures for social or political purposes, the disobedience would subject them to suit under § 501(b). *Johnson* v. *Nelson*, 325 F.2d 646 (8th Cir. 1963); *Pignotti* v. *Sheet Metal Workers*, 477 F.2d 825 (8th Cir. 1973); and *Bright* v. *Taylor*, 554 F.2d 854 (8th Cir. 1977).

> "Section 501 was intended to follow the 'well-established distinction between conferring authority upon an agent or trustee, which is permissible and protects him against liability, and attempting to excuse breaches of trust, which is here made void as against public policy.' H.R. Rep. No. 741, 86th Cong., 1st Sess. 81-82, U.S. Code Congressional and Administrative News, 2480 (1959). Without doubt, the provisions and resolutions upon which the UAW relies fall within the former category of measures that confer authority." [*McNamara*, 522] at 1164
>
> We agree with that disposition. [*Gabauer* v. *Woodcock*, 504 F.2d 662, 670 (8th Cir. 1979) (*en banc*) (Pet. App. at 44-5)]

Examining the legislative history, both Circuits found that Congress had disavowed any intent to prohibit union involvement in politics. Like the Seventh Circuit, the Eighth concluded that: "Without express authorization of Congress, we cannot take unto ourselves the role of deciding which causes a union can or cannot support." 594 F.2d at 670 (Pet. App. at 45).

There is, in short, no split of the Circuits. There is complete agreement, expressed in cases which are, in every respect, identical. There is agreement on the analysis of the statute, on the intent of Congress, and on both the impropriety of and the dangers of expanding federal jurisdiction in this area.

Petitioners' arguments, shorn of their conclusory fur, are simply that—regardless—the judiciary should be turned to these purposes, especially on a motion to dismiss. But, even on petitioners' and the dissent's assumptions, suffice it to observe that what is, and is not appropriate to treatment "on the papers" is best left to the Circuits. This Court has rightly been reluctant to review such a work-a-day issue.

As for the § 201(c) claim (Count I), there is hardly anything to review. The Court of Appeals, for the most part, reversed—holding that the Complaint should be reinstated as to St. Louis records. Petitioners won these issues before the Court of Appeals. All they lost was their claim against the International Union and its Detroit records. But that result is so obviously correct as to not merit revisitation. The International Union's headquarters is in Detroit. Section 201(c), 29 U.S.C. § 461(c), expressly limits venue to the "district in which such labor organization maintains its principal office." (Pet. App. at 72). On its face, that district is the Eastern District of Michigan, not the Eastern District of Missouri. For some reason, petitioners dislike Detroit. But that is their problem, not this Court's.

CONCLUSION

For the foregoing reasons, the Court should *deny* the Petition.

Respectfully submitted,

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